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IN THE SUPREME COURT OF THE STATE OF IDAHO

ROBERT LEON MERTENS,)	
)	
Petitioner–Appellant,)	Supreme Case No. 41866-2014
)	Bonner County No. CV-2004-576
vs.)	
)	
ESTATE OF MARCELLA MERTENS)	
AND GORDON MERTENS,)	
)	
Respondent.)	
_____)	

RESPONDENT’S BRIEF

Appealed from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Bonner

HONORABLE JEFF M. BRUDIE, District Judge presiding.

Robert Mertens, Pro Se
Reg. No. 95642-024
Federal Correction Institute
P. O. Box 5000
Pekin, IL 6155-5000

APPELLANT ACTING PRO SE

James Theodore Diehl
Attorney at Law
106 West Superior Street
Sandpoint, Idaho 83864

ATTORNEY FOR RESPONDENT

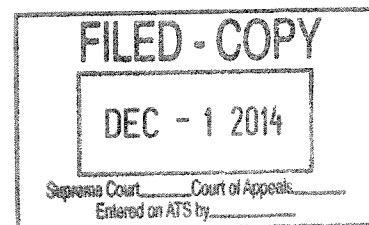


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES AND AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Course of Proceedings	1
C. Issues on Appeal	4
D. Appeal Procedure and Standard of Review	5
II. ADDITIONAL ISSUES PRESENTED ON APPEAL	6
III. ATTORNEY’S FEES ON APPEAL	6
IV. ARGUMENT	7
V. CONCLUSION	9
CERTIFICATE OF MAILING	10

TABLE OF CASES AND AUTHORITIES

<u>CASES:</u>	<u>Pages</u>
<u>Excel Leasing Company v. Christianson</u> , 115 Idaho 708, 769 P.2d 585 (Ct.App. 1989)	6
<u>H & V Engineering, Inc. v. Idaho State Board of Professional Engineers and Land Surveyors</u> , 113 Idaho 646, 747 P.2d 55 (1987)	5
<u>Hindmarsh v. Mock</u> , 138 Idaho 92, 57 P.3d 803(2002)	6
<u>Pass v. Kenny</u> , 118 Idaho 445, 797 P.2d 153 (Ct.App.1990)	7
<u>Staggie v. Idaho Falls Consolidated Hospitals</u> , 110 Idaho 349, 351, 715 P.2d 1019, 1021 (Ct.App.1986)	5
<u>State vs. McNichols</u> , 62 Idaho 616, 115 P.2d 104(1941)	7
<u>Ticor Title Company v. Stanion</u> , 144 Idaho 119, 157 P.3d 613(2007)	6

<u>IDAHO STATUTES</u>	<u>Pages</u>
<u>Idaho Code</u> §12-121	6

IDAHO APPELLATE RULES

I.A.R. Rule 11	5
I.A.R. Rule 12.1	5
I.A.R. Rule 41	6

IDAHO RULES OF CIVL PROCEDURE

I.R.C.P. Rule 54	1,7
I.R.C.P. Rule 83	1,5

I.

STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This matter relates to protracted proceedings in the probate of the Estates of Marcella Mertens and Gordon Mertens, which was complicated by a number of factors including the Appellant's incarceration in Federal prison and the government's forfeiture proceedings relative to funds and other assets to which Robert Mertens may have been entitled in the probate proceedings.

B.

COURSE OF PROCEEDINGS

The course of proceedings in this matter is a tangled web that has been proceeding in fits and starts for the past ten years. In order to address the issue on appeal, it is necessary to understand the relevant proceedings:

1. The most relevant and most critical issue is the Magistrate Court's ruling entered November 21, 2008, awarding Robert Mertens the sum of \$3,500.00 as his "full and final distribution relating to any interest Robert Mertens has in the Estates of Gordon and Marcella Mertens." . (R. Vol. V, p. 893). This decision would be deemed a "final order" pursuant to I.R.C.P. Rules 54 and 83.

2. The November 21, 2008, Order was appealed by Robert Mertens and after several procedural steps, the matter was remanded to the District Court as a timely filed appeal (R. Vol. V, p. 926).

3. After several more procedural steps, the matter was presented to the District Court Judge who on June 24, 2010, affirmed the Magistrate's Final Order of Distribution (R. Vol. VI, p. 1086).

4. Robert Mertens appealed the District Court Decision to the Idaho Supreme Court, who assigned the appeal to the Idaho Court of Appeals. The Notice of Appeal filed by Appellant included a laundry list of issues. The Court of Appeals issued a decision on January 17, 2012, affirming most of the issues but remanding to the Magistrate Court two relatively narrow issues:

(i) Robert's interest as co-owner, if any, in stock that was liquidated other than that stock for which the full proceeds had been distributed to Robert; and

(ii) Whether any estate debts or expenses that were paid from the proceeds of assets devised to Robert should be allocated among other devisees with corresponding reimbursement to Robert or to the federal government as Robert's successor.

(R. Vol. VI, p. 1139).

5. Robert Mertens sought review to the Idaho Supreme Court; however, that review was denied. The Magistrate Court, on July 23, 2012, entered its ruling on the two issues remanded to it by the Court of Appeals. (R. Vol. VII, p. 1302).

6. The Magistrate's Decision on remand was clarified by an Order filed August 15, 2012. (R. Vol. VII, p. 1334).

7. The decision on remand, as well as the Order for Clarification were appealed by Robert Mertens where he was again seeking review of not only the decisions following Remand but all other issues which were raised in prior proceedings. (R. Vol. VII, p. 1351).

8. After a number of procedural steps and missteps, the appeal was dismissed by Order entered May 31, 2013. (R. Vol. VII, p. 1398).

9. The final proceeds were distributed to Robert Mertens in accordance with the Decision on Remand and subsequently, an Estate Closing Order and Decree of Final Discharge were filed on July 2, 2013 and July 15, 2013, respectively. (R. Vol. VIII, p. 1488 and p. 1494).

10. On or about August 9, 2013, Robert Mertens filed a Motion and Affidavit for Fee Waiver regarding an appeal to District Court. (R. Vol. VIII, p. 1496).

11. The fee waiver was initially denied by the Magistrate Court, but on September 30, 2013, the Magistrate Court approved of the waiver of fees. (R. Vol. VIII, p. 1509).

12. A document entitled Amended Notice of Appeal to the District Court was filed on October 15, 2013, which sought to appeal the Decision on Remand, as well as the Clarification Order and, in addition, sought to appeal numerous other issues. (R. Vol. VIII, p. 1510).

13. On November 25, 2013, the District Court provided Notice of Intent to Dismiss Appeal and after giving Robert Mertens an opportunity to respond, an Order of Dismissal was entered January 7, 2014. (R. Vol. VIII, p. 1530).

14. In the instant appeal, Robert Mertens is seeking review of the District Court Dismissal and is also seeking to re-introduce the same laundry list of issues that he has repeatedly raised throughout these proceedings. (R. Vol. VIII, p. 1555).

15. By Order entered April 24, 2014, the Idaho Supreme Court entered a ruling that the appeal “shall be considered timely as to only the Order of Dismissal filed in the District Court on January 7, 2014, and this appeal may proceed on that issue alone.” (R. Vol. VIII, p. 1569).

C.

ISSUES ON APPEAL

Whether the District Court committed reversible error by dismissing the appeal on the basis that it was not timely filed.

D.

APPEAL PROCEDURE AND STANDARD OF REVIEW

Rule 83(a) of the Idaho Rules of Civil Procedure provides:

...absent an order allowing a permissive appeal pursuant to Idaho Appellate Rule 12.1, an appeal must first be taken to the District judge's division of the District Court for any of the following judgments or orders rendered by a Magistrate:

- (1) A final judgment in a civil action or a special proceeding commenced or assigned to, the Magistrate's Division of the District Court.

Pursuant to Rule 11 of the Idaho Appellate Rules, a decision by the District Court dismissing an appeal is an appealable decision. H & V Engineering, Inc. v. Idaho State Board of Professional Engineers and Land Surveyors, 113 Idaho 646, 747 P.2d 55 (1987).

In identifying the proper standard of review of the District Court Decision, the appellate court must differentiate among the fact finding, law stating and law applying functions of the lower court. Staggie v. Idaho Falls Consolidated Hospitals, 110 Idaho 349, 351, 715 P.2d 1019, 1021 (Ct.App.1986). Appellate judges defer to findings of fact based upon substantial evidence, but they review freely the conclusions of law reached by stating legal rules or principles and applying them to the facts found. *Id.*

II.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Most of the issues raised in Appellant's Notice of Appeal, as well as the issues raised in Appellant's Brief, other than the specific issue of whether the District Court committed error in dismissing the appeal, are barred by the Doctrine of *Res Judicata*. The Idaho Court of Appeals in its earlier Decision filed January 17, 2012, affirmed the Magistrate's Decision on all issues with the exception of the two issues remanded to the Magistrate Court. The laundry list of issues that has continually been presented by Robert Mertens were argued and disposed of by the District Court Judge and were affirmed on appeal to the Idaho Court of Appeals. *Res Judicata* bars any further presentation of the issues raised by Appellant other than the very narrow issue of whether the District Court committed error in dismissing the appeal. Hindmarsh v. Mock, 138 Idaho 92, 57 P.3d 803(2002); Ticor Title Company v. Stanion, 144 Idaho 119, 157 P.3d 613(2007).

III.

ATTORNEY'S FEES ON APPEAL

Respondent requests that they be awarded attorney's fees and costs on this appeal pursuant to I.A.R. Rule 41, I.C. §12-121. An award of attorney's fees may be granted under I.C. §12-121 to the prevailing party on appeal if the court is left with the belief that the appeal has been brought frivolously, unreasonably or without foundation. Excel Leasing Company v. Christianson, 115 Idaho 708, 769 P.2d 585 (Ct.App. 1989). An award of attorney's fees will be made if the law is well

settled and the Appellant has made no substantial showing that the lower court misapplied the law, or on a review of discretionary decisions, no cogent challenge is presented with regard to the trial judge's exercise in discretion. Pass v. Kenny, 118 Idaho 445, 797 P.2d 153 (Ct.App.1990).

In the present case, the Appellant has cited absolutely no authority for the appeal of the decision by the Magistrate or the District Court Judge and is simply arguing that he does not like the rulings of the Magistrate. Accordingly, this appeal has been brought frivolously, unreasonably and without foundation and Respondents should be awarded their attorney's fees and costs on appeal.

IV.

ARGUMENT

The District Court did not error in dismissing the appeal on the basis that the Notice of Appeal was untimely.

Pursuant to Rule 54 of the Idaho Rules of Civil Procedure, a "judgment" is a final determination of the rights of the parties in an action or proceeding. State vs. McNichols, 62 Idaho 616, 115 P.2d 104(1941). Whether a document expressing the action of a Court is a "court order" or a "court judgment" is determined not by its title but by its contents. *Id.*

The Order for Final Distribution to Robert Mertens filed November 21, 2008, was clearly a "final judgment" at least as it relates to any interest that Robert Mertens was entitled to from the Estates of Gordon and Marcella Mertens. (R. Vol. V, p. 893). The Magistrate Order for Final Distribution was clearly treated as a final judgment because it was appealed and ultimately acted

upon by the Idaho Court of Appeals when it issued its unpublished opinion No. 321 filed January 19, 2012. (R. Vol. VI, p. 1139).

The Order entered by the Magistrate Court following Remand is a final decision resolving any and all interest that Robert Mertens has in the Estates of Gordon and Marcella Mertens. (R. Vol. VII, p. 1302 and 1334).

Robert Mertens had the opportunity to appeal the decision following Remand and he did in fact timely file an appeal but the appeal was taken directly to the Supreme Court. (R. Vol. VII, p. 1351). On October 1, 2012, Robert Mertens filed a Notice of Appeal to the District Court. (R. Vol. VII, p. 1366). Arguably, the October 1, 2012, Appeal was not timely as it occurred 47 days following the Clarification Order and 70 days following the Decision on Remand. While the District Court never ruled on the timeliness of the appeal, that issue became moot when Robert Mertens sought a voluntary dismissal of the appeal. (R. Vol. VII, p. 1392). An Order Dismissing the Appeal was entered on May 31, 2013. (R. Vol. VII, p. 1398). Once the Order was entered dismissing the appeal, Robert Mertens' right to appeal was extinguished.

Based upon the May 31, 2013, Dismissal, an Estate Closing Order was issued directing that final payments from the Estate be made and that the Personal Representative be discharged. (R. Vol. VIII, p. 1488 and 1493). These final procedural orders do not reinstate Robert Mertens' right to appeal as all of his rights were determined by the earlier decision following Remand. The District Court properly identified that the 2012 Decision on Remand and the Clarification Order represent

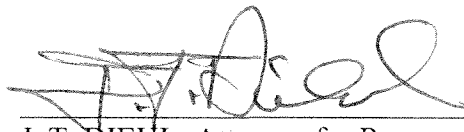
the final order as it relates to Robert Mertens' interest in the Estate. (R. Vol. VII, p. 1302 and R. Vol VII, p. 1334, respectively). Therefore, Robert Mertens' Notice of Appeal, whether filed in September, 2013, or October, 2013, is immaterial as more than 42 days had expired since the final determination of Robert's interest. To allow Mertens to again appeal based upon the Decree of Final Discharge is prejudicial to the Estate as all of the assets from the Estate have been distributed and the Personal Representative has been discharged and released from the duties imposed upon a Personal Representative.

V.

CONCLUSION

The Order entered by the District Court Judge dismissing the appeal is supported by the law of Idaho and needs to be affirmed. Respondent should also be awarded its attorney's fees and costs.

Respectfully submitted this 26th day of November, 2014.

A handwritten signature in black ink, appearing to read "J. T. Diehl", is written over a horizontal line.

J. T. DIEHL, Attorney for Respondent

CERTIFICATE OF DELIVERY

26th I hereby certify that a true and correct copy of the foregoing document was served this day of November, 2014, by United States Mail addressed to:

Robert Mertens
#95642-024
Federal Corrections Institute
P. O. Box 5000
Pekin, IL 61555-5000

